COMMENTS

FAIRNESS AND EFFICIENCY IN REMOVAL PROCEEDINGS: THE HIDDEN COSTS OF NOT APPOINTING COUNSEL TO NONCITIZENS

CORIN JAMES*

* J.D. Candidate, 2021, American University Washington College of Law. This Comment is dedicated to my parents, who have taught me to advocate for those whose stories are too often overlooked. I would like to thank the *Administrative Law Review* staff for their guidance and support throughout this process, and Professors David McConnell and Andrew Popper for their thoughtful oversight.

INTRODUCTION

Without the advice and guidance of counsel, noncitizens facing removal proceedings are at a distinct disadvantage in navigating the complex, overburdened, and backlogged immigration system.[1] Legal scholars convincingly argue due process requires the appointment of counsel to noncitizens in this context.[2] Yet, the system remains constitutionally suspect. As of 2016, only sixty-one percent of individuals facing adverse proceedings in immigration courts were represented by attorneys,[3] and representation for detained individuals is often substantially lower.[4] Some key players in the immigration system remain surprisingly unconcerned about the implications of this asymmetry of representation. Recently, an immigration judge made news headlines by asserting that he could adequately explain immigration law to the three- and four-year-old toddlers representing themselves pro se in his courtroom, stating that "[t]hey get it" and "[y]ou can do a fair hearing" under these circumstances.[5]

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1. *See* JENNIFER STAVE ET AL., VERA INST. OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 7–12 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf [hereinafter VERA STUDY 2017] (showing a jump in successful outcomes from four percent to forty-eight percent for individuals facing removal proceedings who were appointed counsel).

2. *See generally* Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113 (2008) (arguing for a constitutional right to appointed counsel for noncitizens facing removal based on a due process analysis); Shane T. Devins, Comment, *Using the Language of* Turner v. Rogers *to Advocate for a Right to Counsel in Immigration Removal Proceedings*, 46 J. MARSHALL L. REV. 893 (2013) (using *Turner v. Rogers* as the basis for a due process analysis that weighs in favor of appointing counsel in the immigration context); Ramanujan Nadadur, Note, *Beyond "Crimigration" and the Civil-Criminal Dichotomy – Applying* Mathews v. Eldridge *in the Immigration Context*, 16 YALE HUM. RTS. & DEV. L.J. 141 (2013) (arguing that the criminal-civil procedure dichotomy is flawed and presenting a model of administrative procedure that favors appointing counsel to noncitizens facing removal).

3. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 Statistics Yearbook F1 (2017), https://www.justice.gov/eoir/page/file/fysb16/download.

4. *See* Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 748 (2002) (noting the location of detention centers outside of heavily populated areas, making it difficult for immigration lawyers to represent detained clients); *see also* Lyon v. ICE, 171 F. Supp. 3d 961 (N.D. Cal. 2016) (cataloguing obstacles that plaintiff detainees face in preparing cases because of the distance between detention centers and immigration court in San Francisco).

5. Jerry Markon, *Judge Says Three-Year-Old Girl Can Represent Herself in Immigration Court*, INDEPENDENT (Mar. 4, 2016, 4:45 PM), https://www.independent.co.uk/news/world/americas/judge-says-three-year-old-girl-can-represent-herself-in-immigration-court-a6912336. html.

These stories suggest that noncitizens facing removal are not benefiting from due process. Legal scholars have argued for heightened procedural safeguards—most prominently, the appointment of counsel to noncitizens facing removal proceedings—as a remedy for this deficit in due process. Some scholars focus on the intersection of criminal and immigration law (called "crimmigration") and argue that the liberty interest at stake[6] in both detaining and deporting noncitizens makes immigration proceedings more criminal than civil in nature.[7] The Supreme Court has consistently held that noncitizens are entitled to due process, which includes freedom from "bodily restraint,"[8] illustrating that detention implicates a clear liberty interest for noncitizens.[9] Others cite landmark Supreme Court decisions that articulate the significant factors in a due process analysis and argue that these factors support a need for appointed counsel in certain noncriminal proceedings.[10] The *Mathews*[11] analysis is the seminal due process test for examining which factors a court should consider in deciding whether procedural safeguards are necessary to ensure due process in administrative proceedings.[12]

Significantly, *Mathews* enumerates government interest as one of the factors that courts should consider in a due process analysis.[13] Despite the strong individual interest at stake in removal proceedings, the potential cost to the government ostensibly weighs against appointed counsel or other procedural safeguards for noncitizens facing removal.[14] Indeed, the Immigration and

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6 *See* Foucha v. Lousiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has alw ays been at the core of the liberty protected by the Due Process clause from arbitrary governm ental action."); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) (clarifying the presumption that noncitizens are entitled to due process by explaining "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.").

7. *See generally* Nadadur, *supra* note 2 (explaining the general "crimigration" framework and how scholars use it to argue for a constitutional right to appointed counsel because immigration proceedings are closely intertwined with criminal proceedings and penalties). While Nadadur renders this word "crimigration," this Comment utilizes the more common spelling "crimmigration."

8 *Foucha*, 504 U.S. at 80.

9 *See id.*; *Plyler*, 457 U.S. at 210.

10. *See, e.g.*, Kaufman, *supra* note 2 (cataloguing cases from different noncriminal contexts which address the right to appointed counsel); Devins, *supra* note 2 (using the factors discussed in *Turner* as a roadmap to a constitutional foundation for appointed counsel in immigration proceedings).

11. Mathews v. Eldridge, 424 U.S. 319 (1976).

12. *See infra* Part II. Analysis: Applying *Mathews* to Immigration

13. *Mathews*, 424 U.S. at 335.

14. *See, e.g.*, Kaufman, *supra* note 2, at 144 ("[P]roviding counsel to all detained and lawful permanent residents would undoubtedly involve substantial costs to the government.").

Nationality Act (INA) establishes a right to be represented by counsel in removal proceedings, but specifically stipulates that this right be "at no expense to the Government."[15] Courts consistently refer to the statute's language when facing the issue of appointed counsel in removal proceedings.[16]

But the hidden costs of not appointing counsel to noncitizens facing removal are significant.[17] Courts assume a system of appointed counsel would necessarily incur an expense to the government.[18] However, recent studies and pilot programs that experiment with appointing counsel in immigration courts indicate this may not be the case.[19] Arguing for appointed counsel in immigration proceedings is not new—but perhaps a focus on the hidden economic costs will prove more convincing to those that would dismiss such a system as economically unfeasible.

Part I of this Comment will provide a background of the *Mathews* due process analysis and examine how it applies to different legal contexts, highlighting particularly instructive cases. Part II will address how *Mathews* and its progeny apply to the immigration context. Part III will recommend that the government adopt a system in which counsel is appointed to noncitizens facing removal. Just outcomes, judicial efficiency, and the United States' international reputation are at stake, and the hidden costs of not providing counsel to noncitizens facing removal urge adoption of the proposed heightened procedural safeguard.

I. APPOINTMENT OF COUNSEL BACKGROUND AND THE *MATHEWS* TEST

A. Mathews *in the Criminal Context and Intersection with Immigration*

In administrative adjudications, agencies must comply with the due process analysis established by the Supreme Court's seminal decision in *Mathews v. Eldridge*.[20] According to *Mathews*, courts should grant additional procedural

15. 8 U.S.C. § 1362 (2012).

16. *See, e.g.*, C.J.L.G. v. Sessions, 880 F.3d 1122, 1133 (9th Cir. 2018) (explaining that court-appointed counsel at government expense is "a privilege that Congress has not conferred").

17. *See generally* JOHN D. MONTGOMERY, NATIONAL ECONOMIC RESEARCH ASSOCIATES (NERA) ECONOMIC CONSULTING, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS (2014), http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf [hereinafter NERA STUDY 2014] (highlighting costs of unnecessarily prolonged court proceedings and detention).

18. *See, e.g.*, *C.J.L.G.*, 880 F.3d at 1133–34.

19. *See, e.g.*, NERA STUDY 2014, *supra* note 17.

20. 424 U.S. 319 (1976).

safeguards to ensure due process requirements are satisfied based on an analysis of three weighing factors: (1) the individual interest at stake in the proceeding; (2) the risk of erroneous deprivation of that interest and probable added value of additional procedural safeguards; and (3) the governmental interest in the proceeding, including the financial costs of additional procedural safeguards.[21]

In addition to administrative adjudications, the Supreme Court applies the *Mathews* analysis to criminal cases,[22] and the criminal context provides a useful point of comparison to immigration proceedings. Criminal procedure employs certain constitutional safeguards because of the significance of the individual liberty interest at stake,[23] and the right to appointed counsel in criminal proceedings has evolved over time into a per se rule.[24] This right attaches so long as the penalty of the alleged offense is actual imprisonment.[25] Generally, the greater the individual interest at stake, the more extensive the procedural safeguards are required to ensure a lower probability of error.[26] For example, criminal proceedings involving a potential death penalty punishment often require heightened safeguards during the sentencing phase of

21. *Id.* at 334–35.

22. *See, e.g.*, United States v. Ruiz, 536 U.S. 622, 631, 633 (2002) (applying the *Mathews* analysis to determine whether the government should be required to disclose "material impeachment evidence" to a criminal defendant before she agrees to a plea bargain); United States v. Raddatz, 447 U.S. 667, 677 (1980) (applying *Mathews* analysis to determine whether a district court judge should be required to hear the challenged testimony in deciding a motion to suppress evidence).

23 *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (asserting that the liberty protected by the Due Process Clause encompasses a freedom from bodily restraint); *see also* O'Connor v. Donaldson, 422 U.S. 563, 573 n.8 (1975) (applying the freedom from bodily restraint to institutional confinement: "[t]hat a wholly sane and innocent person has a constitutional right not to be physically confined by the State when his freedom will pose a danger neither to himself nor to others cannot be seriously doubted").

24. *See* Betts v. Brady, 316 U.S. 455, 471–72 (1942) (holding that counsel should be appointed in criminal proceedings on a case-by-case basis). *But see* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (overruling *Betts* and replacing the case-by-case analysis with a per se rule, noting "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

25. *See* Scott v. Illinois, 440 U.S. 367, 373 (1979) (citing Argersinger v. Hamlin, 407 U.S. 25 (1972)) (reaffirming that actual imprisonment, as distinguished from fines or threats of imprisonment, is the "line defining the constitutional right to appointment of counsel").

26. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (plurality opinion) (holding that courts should limit the discretion afforded to a sentencing body in death penalty cases to minimize the risk of arbitrary or capricious action).

the prosecution; examples of these safeguards include independent review of the death sentence by either a sentencing judge or an appellate tribunal, and an automatic appeal if the individual is sentenced to death.[27] These examples illustrates the correlation between a greater individual interest and heightened procedural safeguards.

Many of the procedural safeguards that attach in criminal cases do not apply in immigration proceedings; since the (in)famous 1889 Chinese exclusion case, *Chae Chan Ping v. United States*,[28] immigration proceedings have been implicitly and explicitly classified as civil cases.[29] In *Fong Yue Ting v. United States*,[30] the Court held that deportation, unlike banishment (expulsion), does not deprive an individual of life, liberty, or property without due process of law.[31] Thus, trial by jury and other constitutional protections have no application in this context.[32] But a historical analysis supports the idea that removal proceedings are more criminal than civil in nature.[33] In England, as well as the early American colonies, *exclusion* was a civil administrative power whereas *expulsion* was a criminal punishment imposed after completion of the criminal process.[34] Exclusion at the border seems different from expulsion of those already living in the United States. Advocates of the crimmigration paradigm argue that the punitive nature of deportation makes immigration proceedings more criminal than civil in nature, and therefore noncitizens facing removal should be entitled to heightened procedural safeguards.[35] In

27. *E.g.*, Gregg v. Georgia, 428 U.S. 153, 198 (1976) (noting that Georgia requires all death sentences to be automatically appealed to the state supreme court).

28. 130 U.S. 581 (1889).

29. *See id.* at 606–07 (emphasizing the broad power of the government to exclude noncitizens from the country so long as it is in the public interest); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (reaffirming the civil nature of deportation hearings, stressing that an immigration judge does not adjudicate guilt or administer punishment and therefore protections that apply in criminal proceedings do not apply in a deportation hearing).

30. 149 U.S. 698 (1893).

31. *Id.* at 730 (distinguishing banishment as the expulsion of an individual from his own country as a criminal penalty).

32. *Id.* (explaining that deportation is enforcing the return of an alien who has not complied with the government's conditions).

33. *See* Peter L. Markowitz, *Straddling the Criminal-Civil Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 308 (2008) (tracing the historical distinction of exclusion as a civil penalty and expulsion as a criminal one).

34. *Id.* at 325–26 (explaining how historical models from the American colonies and common-law England, which differentiated between the civil administrative power to exclude noncitizens from the country and the criminal power to expel those already within the country, likely shaped the Framers' conception of deportation).

35. *See* Austin T. Fragomen, Jr., *The 'Uncivil' Nature of Deportation: Fourth and Fifth Amendment*

the criminal context, due process protections apply regardless of citizenship status—for example, the right to appointed counsel in criminal proceedings is available to citizens and noncitizens.[36]

Following the Court's recent decision in *Padilla v. Kentucky*,[37] immigration law has become increasingly intertwined with criminal law despite its civil classification.[38] In *Padilla*, the Court found that the Sixth Amendment right to the effective assistance of counsel requires criminal defense attorneys to advise noncitizen clients of the immigration consequences of a guilty plea or conviction and that a failure to do so is per se deficient under the *Strickland*[39] standard for an ineffective assistance of counsel analysis.[40] In accordance with this decision, criminal defense attorneys must regularly consult with immigration experts to navigate the complexities of immigration law and adequately advise their noncitizen clients.[41] Consistent with other opinions in this area of jurisprudence, the Court acknowledged that deportation is "intimately related to the criminal process."[42] However, despite the Court's characterization of deportation as a severe "penalty," it ultimately declined to classify it as a criminal sanction.[43]

The civil designation of immigration proceedings has wide-ranging consequences for the modern-day intersections of immigration and criminal law. For example, a defendant who pled guilty to a criminal offense decades ago is not protected from new immigration rules that could result in his removal.[44] The Ex Post Facto Clause provides no protection in noncriminal contexts, and a noncitizen can be removed based on a past guilty plea that

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Rights and the Exclusionary Rule, 45 BROOK. L. REV. 29, 34–35 (1978) (analyzing similarities between law enforcement interactions with individuals in the criminal and immigration contexts and arguing that "deportation proceedings should be deemed 'criminal' or 'quasi-criminal' in nature" to provide adequate constitutional safeguards in the immigration system).

36. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens.").

37. 559 U.S. 356 (2010).

38. *See id.* (requiring certain procedural safeguards for noncitizens in criminal cases).

39. Strickland v. Washington, 466 U.S. 668 (1984).

40. *Padilla*, 559 U.S. at 367 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.").

41. *See* Nadadur, *supra* note 2, at 142 (noting that some criminal defense offices have created new positions for immigration experts and that state bars and other organizations have sponsored immigration law training sessions for defense attorneys).

42. *Padilla*, 559 U.S. at 365.

43. *Id.*

44. *See* Nadadur, *supra* note 2, at 144 (noting that a congressional change in deportable offenses can be applied retroactively).

carried no immigration consequences at the time it was entered.[45] The expansion of the list of "aggravated felonies," which bar noncitizens from numerous forms of relief and can result in permanent inadmissibility, illustrates the increasingly intertwined interaction between criminal and immigration law.[46] Additionally, the Court has held that the Exclusionary Rule—a judicial remedy for certain violations of the Bill of Rights by the government—does not apply in a removal proceeding because the hearing is a civil proceeding that determines eligibility to remain in the United States, rather than criminal punishment for unlawful action.[47] Thus, despite the increased intersection of immigration and criminal law and the potential criminal-like consequences immigration courts can impose, noncitizens facing removal are not entitled to the same procedural protections as criminal defendants.

B. The Mathews *Test and Civil Cases*

While the right to appointed counsel is well established in the criminal context, courts have also extended this procedural safeguard to some noncriminal contexts.[48] These extensions, from both before and after the *Mathews* due process test emerged, can all be understood in terms of the three weighing factors that *Mathews* outlines. The first factor is the individual interest at stake. In *Lassiter v. Department of Social Services of Durham County, North Carolina*,[49] the Court held that if deprivation of physical liberty is not an issue, there is a presumption against a right to appointed counsel.[50] The Court ultimately affirmed the trial court's decision not to appoint counsel to Lassiter in a parental termination proceeding because the case did not

45. *See* Markowitz, *supra* note 33, at 294 (highlighting how a defendant could have been correctly advised that pleading guilty would not have immigration consequences and still not be protected from removal today due to subsequent changes in the immigration laws).

46. *See* 8 U.S.C. § 1101(a)(43)(A)–(U) (2012); *see also* AMERICAN IMMIGRATION COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW (2016), https://www.americanimmigrationcouncil.org/sites/ default/files/research/aggravated_felonies.pdf (summarizing the immigration consequences for aggravated felonies).

47. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

48 *See, e.g.*, Turner v. Rogers, 564 U.S. 431 (2011) (acknowledging a limited case-specific right to appointed counsel for individuals found in civil contempt facing potential incarceration); Vitek v. Jones, 445 U.S. 480 (1980) (requiring appointed counsel for indigent defendants facing civil commitment); *In Re Gault*, 387 U.S. 18 (1967) (extending the right to appointed counsel to juvenile delinquency hearings).

49. 452 U.S. 18 (1981).

50. *See id.* at 27 (explaining that the presumption against appointed counsel can be overcome by weighing the three *Mathews* analysis factors: the individual interest at stake, the risk of erroneous deprivation, and the government interest).

present particularly troublesome points of law, no expert witnesses testified, and the presence of counsel likely would not have made an outcome-determinative difference.[51] At the time of the decision, thirty-three states and the District of Columbia had already adopted laws to statutorily provide for the appointment of counsel in parental termination proceedings.[52] The Court explicitly stated it did not intend to undermine the wisdom of these laws and reconciled its holding by noting that, while the appointment of counsel in this case was not constitutionally required, public policy can prescribe higher standards.[53] *Lassiter* provides an example of a context in which the *Mathews* second factor weighed against appointing counsel; while an individual's interest in retaining parental rights is undoubtedly significant (first factor), the lack of complexity of the law meant that additional safeguards would add little value to the proceedings.[54] Importantly, *Lassiter* illustrates the heavy burden to overcome the presumption against appointed counsel.

The first two *Mathews* factors together can weigh strongly enough against the presumption to satisfy this burden. *In Re Gault*[55] established that juvenile delinquency hearings require the same procedural protections as criminal hearings, including the right to appointed counsel.[56] The individual interest at stake in juvenile delinquency hearings is similar to that in criminal proceedings,[57] and juveniles require the assistance of counsel to effectively address legal problems, make factual inquiries, follow procedures of the court, and present a proper defense.[58] The first and second factors of the *Mathews* analysis weigh heavily in favor of appointment of counsel in this context—the individual interest at stake and the risk of erroneous deprivation without additional procedural safeguards are both significant. Appointed counsel for children unable to navigate the complexity of the law mitigates this risk and increases judicial integrity and the probability of a just outcome.[59]

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51. *Id.* at 32 (noting that the facts and circumstances of this case did not raise complex substantive or procedural questions that an attorney could have more effectively addressed).

52. *Id.* at 34.

53. *Id.* at 33.

54. *Id.* at 31–33.

55. 387 U.S. 18 (1967).

56. *Id.*

57. *Id.* at 36 ("A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.").

58. *Id.* at 36 (internal citations omitted).

59. *Id.* at 36–38.

Similarly, in *Vitek v. Jones*,[60] the Court held that appointed counsel is required for indigent people facing civil commitment.[61] While a criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement, certain changes in this confinement can still trigger due process protections.[62] The Court distinguished prisoners facing civil commitment as part of a special class, noting that a prisoner with a mental illness has a greater need for legal representation because he is more likely to have difficulty exercising his rights.[63] Facing potential civil commitment implicates the same liberty interest as imprisonment and, as with juveniles in *Gault*, the risk of erroneous deprivation is high for individuals ill-equipped to fully understand and exercise their rights. Thus, the *Mathews* weighing factors tilt in favor of appointed counsel to ensure due process is realized.

In other legal contexts, the Court has found appointment of counsel to be constitutionally required on a limited case-by-case basis. In *Gagnon v. Scarpelli*,[64] the Court addressed appointment of counsel in the quasi-criminal context of probation revocation hearings.[65] Undoubtedly, the liberty interest is often as significant as that in criminal cases given the potential for incarceration if probation is revoked. However, the Court chose to adopt a case-by-case approach in these proceedings instead of an "inflexible constitutional rule," justifying the distinction as reflecting the procedural differences between criminal trials and probation revocation hearings.[66] The Court noted invariable attributes of criminal proceedings that make the appointment of counsel necessary.[67] These characteristics include the formal rules of evidence, procedural rights that are lost if not raised timely, and the need for a presentation of a defense understandable to untrained jurors.[68] Revocation proceedings are distinct from criminal proceedings in several significant ways: the state is represented by a parole officer instead of a prosecutor; formal procedures and rules of evidence do not apply; and the hearing body, unlike untrained jurors, is familiar with the general problems that can arise in the context of probation and parole.[69]

60. 445 U.S. 480 (1980).

61. *Id.* at 497.

62. *Id.* at 488 (noting how certain due process protections apply to revocation of probation or parole, forfeiture of state-created rights to "good-time credits," and decisions to impose solitary confinement).

63. *Id.* at 496–97.

64. 411 U.S. 778 (1973).

65. *Id.* at 790.

66. *Id.*

67. *Id.* at 789.

68. *Id.*

69. *Id.*

Thus, the lack of procedural complexity justifies a different rule. While the individual interest at stake is often comparable to that in a criminal proceeding, the second prong of *Mathews* did not tilt the balance enough to overcome the presumption and the Court found no need for per se appointed counsel in this context.[70] However, *Gagnon* and its progeny allow for appointment of counsel in these hearings under special circumstances using a "fundamental fairness" standard; the Court did not define this standard, but noted an important consideration is "whether the probationer appears to be capable of speaking effectively for himself."[71] This suggests that government-appointed counsel would be appropriate in circumstances in which the legal questions are particularly complex.

Civil cases with criminal-like consequences also present difficult questions of when appointed counsel should be constitutionally required.[72] In *Turner v. Rogers*,[73] the defendant was held in civil contempt and threatened with incarceration after failing to make child support payments.[74] Applying the *Mathews* analysis, the Court held that due process does not automatically require the appointment of counsel for indigent defendants facing civil contempt, despite the potential consequence of incarceration.[75] The Court found that alternative procedural safeguards, focused on adequately educating the defendant about the hearing, mitigated the risk of erroneous deprivation of individual liberty.[76] The lack of legal complexity and asymmetrical legal representation were both significant factors that weighed against the need for appointed counsel in that type of proceeding.[77] By introducing these two refinements of the *Mathews* test—the complexity of the case and the

70. *Id.* at 788–90 (acknowledging how in some cases only a trained advocate can fairly represent a probationer or parolee, but also highlighting the significant interests in informality, flexibility, and economy that justify not adopting a per se rule of appointed counsel).

71. *Id.* at 790–91.

72. *See* Turner v. Rogers, 564 U.S. 431 (2011) (holding that while the Court did not require appointed counsel in the specific circumstances of this case, appointed counsel could be appropriate in slightly different circumstances).

73. 564 U.S. 431 (2011).

74. *Id.* at 431.

75. *Id.* at 448 ("the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)").

76. *Id.* at 447–48 (articulating the safeguards in this case: "(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay").

77. *Id.* at 446–47.

desirability of symmetrical legal representation—the Court in *Turner* may have provided a roadmap for what advocates seeking to establish a right to appointed counsel must demonstrate.[78]

II. ANALYSIS: APPLYING *MATHEWS* TO IMMIGRATION

Courts have consistently declined to recognize the appointment of counsel in removal proceedings as a constitutional right.[79] Some courts have justified limits on due process procedural rights for noncitizens simply because of their noncitizen status. For example, the Tenth Circuit articulated: "Because aliens do not have a constitutional right to enter or remain in the United States, the only protections afforded are the minimal procedural due process rights for an 'opportunity to be heard at a meaningful time in a meaningful manner.'"[80]

The Supreme Court first applied the *Mathews* analysis to the immigration context in *Landon v. Plasencia*.[81] Without deciding whether Plasencia was afforded due process in previous hearings, the Court emphasized that the relevant inquiry is whether the procedures met the minimum standards of due process, not whether the Court itself would have made a different policy decision.[82] Despite this (lack of a) decision, applying the *Mathews* factors to different types of proceedings can provide a foundation for arguing that additional procedural safeguards are necessary to meet these minimum due process standards for noncitizens facing removal. Comparing these varied legal circumstances to removal proceedings supports the argument that all three *Mathews* factors weigh in favor of appointing counsel in this context.

A. Individual Interest at Stake

The first prong of the *Mathews* test is the weight of the individual interest at stake.[83] Both detention and deportation implicate significant liberty interests for noncitizens in the immigration system.

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78. *See* Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting* Franco-Gonzalez, 90 ST. JOHN'S L. REV. 915, 932 (2016) (using *Turner* as the foundation for a constitutional argument that due process requires appointed counsel in immigration proceedings).

79. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 34 (1982) (noting that control over immigration is largely within the control of the Executive and the Legislative branches).

80. Salgado-Toribio v. Holder, 713 F.3d 1267, 1271 (10th Cir. 2013) (quoting de la Llana-Castellon v. INS, 16 F.3d 1093, 1096 (10th Cir. 1994)).

81. 459 U.S. 21 (1982).

82. *Id.* at 34–35 (highlighting that control over matters of immigration should largely fall to the Executive and Legislative Branches).

83. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

1. Detention

Aside from the ultimate consequence of deportation, Immigration and Customs Enforcement (ICE) detain noncitizens throughout the removal process.[84] Underscoring the similar deprivation of liberty that criminals and immigration-system detainees experience, ICE houses some noncitizens in jails due to lack of space in detention facilities.[85] In some cases, the loss of liberty may be worse for noncitizen detainees than for criminal offenders, both in the length and conditions of the physical confinement. For example, a noncitizen convicted of a misdemeanor-marijuana offense may only spend a few days in jail, but if subsequent removal proceedings are initiated against him, he can be detained for the months or even years that it takes to complete the case.[86] Lack of medical care, inadequate access to the outdoors, inedible and minimal food, and the use of solitary confinement as punishment are all common conditions in detention centers; limited access to urban centers means that legal services and remedies are out of reach for many detainees.[87] Recent policies like the separation of parents and children at the border underscore the severe deprivation of rights that accompanies detention.[88]

2. Deportation

While the Supreme Court has technically distinguished removal proceedings from criminal proceedings, it has acknowledged the significance of the individual interest at stake and the punitive nature of deportation.[89] In 1922,

84. *See* Nadadur, *supra* note 2, at 163 (comparing the similar function and purpose of detention in the immigration context to the criminal context: to deter and punish those who violate laws).

85. *Id.* (internal citations omitted).

86. *See* Markowitz, *supra* note 33, at 295 (internal citations omitted).

87. *See* Detention Watch Network, *Expose & Close: Executive Summary* (Nov. 2012), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Executive%20Summary.pdf (summarizing human rights violations in ten prisons and jails used as immigration detention centers).

88. Nick Cumming-Bruce, *Taking Migrant Children From Parents is Illegal, U.N. tell U.S.*, N.Y. TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html (reporting that the United Nations urged an immediate halt to the practice because it violates migrants' human rights and international law).

89. *See* Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."); *see also* INS v. Errico, 385 U.S. 214, 225 (1966) (characterizing deportation as a "penalty" and "a drastic measure and at times the equivalent of banishment or exile").

Justice Brandeis famously wrote in *Ng Fung Ho v. White*[90] that deportation threatens the loss of "all that makes life worth living."[91] This significant individual interest speaks for itself and makes a fair judicial proceeding absolutely critical. Indeed, changes in immigration law have raised the stakes and increased the social costs of deportation to the individual. Potential consequences include a ten-year bar for reentry for deported individuals and an increased risk of criminal prosecutions for those who do reenter illegally.[92] Thus, the individual that faces potential deportation—permanently losing the ability "to stay and live and work in this land of freedom"—has an indisputable weighty individual interest at stake.[93]

B. Risk of Erroneous Deprivation

The second prong is the risk of erroneous deprivation: will additional safeguards reduce the risk of error in the proceedings?[94] The asymmetry of representation and complexity of immigration law—including the burdens of preparing an adequate defense, especially while detained—suggest that additional safeguards are necessary to protect against the erroneous deprivation of the individual interest.

1. Asymmetry of Representation

The *Gagnon* decision not to provide appointed counsel in probation revocation hearings is a useful contrast to the asymmetric representation in the immigration context. In *Gagnon*, the Court found the nature of probation revocation hearings to be fundamentally different from a criminal trial partially because a parole officer, instead of a prosecutor, represents the state.[95] This distinction is a crucial difference in the nature of the proceeding, and the Court suggested that providing counsel in this context would probably lead the government to represent itself with attorneys instead of probation or parole officers.[96] The Court concluded that this added formality would

90. 259 U.S. 276 (1922).

91. *Id.* at 284 ("To deport one who so claims to be a citizen obviously deprives him of liberty . . . It may result also in loss of both property and life; or of all that makes life worth living.").

92. *See* Kaufman, *supra* note 2, at 140–41 ("Those that return without authorization face the prospect of criminal prosecution for reentry subsequent to removal and, depending on the grounds for the deportation, a sentence of up to twenty years in prison.").

93. Landon v. Plasencia, 459 U.S. 21, 34 (1982).

94. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

95. Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973).

96. *Id.* at 787.

negatively impact the nature of these hearings and the interest of the defendant.[97] In contrast, there is no such risk in removal proceedings which are already formalized and often asymmetrically adversarial—ICE attorneys represent the government against individuals who frequently lack any representation.[98] In 2016, sixty-one percent of the total number of individuals facing removal had representation, but this figure drops to just sixteen percent when considering solely individuals in detention.[99] The remote locations of many detention centers makes it particularly difficult for detained immigrants to secure legal representation.[100]

2. Complexity of Immigration Law

Immigration law is "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."[101] Periodic changes to the INA in 1986, 1990, and 1996 resulted in gradually increasing complexity.[102] It is a daunting challenge to decipher immigration law, and its complexity coupled with the lack of adequate legal representation too often means that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[103] While

97. *See id.* (explaining that attorneys are "advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views").

98. Fatemi, *supra* note 7878, at 932 (highlighting the significance of the often asymmetrical representation in immigration proceedings).

99. *See* FY 2016 Statistics Yearbook, *supra* note 3, at F1; *see also* COLUMBIA LAW SCH. HUMAN RIGHTS INST. & NORTHEASTERN UNIV. SCH. OF LAW PROGRAM ON HUMAN RIGHTS & THE GLOB. ECON., EQUAL ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS 2–3 (2014), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal_access_to_justice_-_cerd_shadow_report.pdf [hereinafter CERD REPORT].

100. *See* CERD REPORT, *supra* note 99, at 5 n.33 (citing HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 31 (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf) ("Forty percent of Immigration and Customs Enforcement bed space is located more than sixty miles from an urban center.").

101. *See* Drax v. Reno, 338 F.3d 98, 99–100 (2d Cir. 2003) (illustrating the complexity of immigration law with a twenty-page opinion that catalogs the background of the case and laments that it "consumed significant resources of this Court. With regret and astonishment, we determine . . . that this case still cannot be decided definitively but must be remanded to the District Court, and then to the Board of Immigration Appeals[ ], for further proceedings").

102. Fatemi, *supra* note 78, at 935 (noting how the increased complexity has created challenges for attorneys and judges alike).

103. Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005); *see also* Wang v. Att'y

Gagnon found that decisions to appoint counsel to probationers and parolees partially turns on the defendant's ability to effectively speak for himself, noncitizens facing removal who often cannot speak English, let alone comprehend the complex language of immigration law, are not afforded a similarly reasonable standard.[104]

C. Government Interest

The third prong of the *Mathews* test is the government interest. As the Court has noted, the government has a weighty interest in efficient administration of immigration laws.[105] While appointing counsel in immigration courts would undoubtedly result in initial costs to the government, recent studies have highlighted the efficiencies in the administration of justice that could be realized with such a system.[106] This economic and judicial efficiency argument—coupled with the government's interest in just outcomes and its international reputation—suggests that the government interest as a whole could weigh in favor of providing appointed counsel in this context.

III. RECOMMENDATION: THE GOVERNMENT INTEREST IN A SYSTEM OF APPOINTED COUNSEL FOR NONCITIZENS FACING REMOVAL

The government interest in an efficient immigration system could be better served by creating a system of appointed counsel for noncitizens facing

Gen., 423 F.3d 260, 269 (3d Cir. 2005) ("[T]he tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding."); Sosnovskaia v. Gonzales, 421 F.3d 589, 594 (7th Cir. 2005) ("[T]he procedure that the [immigration judge] employed in this case is an affront to [petitioner's] right to be heard."); Soumahoro v. Gonzales, 415 F.3d 732, 738 (7th Cir. 2005) (per curiam) (deciding that the immigration judge's factual conclusion is "totally unsupported by the record"); Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2004) ("[T]he elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board [of Immigration Appeals] in this as in other cases.").

104. Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973); *see, e.g.*, C.J.L.G v. Sessions, 880 F.3d 1122, 1131 (9th Cir. 2018) (addressing but not condemning an immigration judge's actions in providing an unrepresented minor and his mother, neither of whom spoke English, a country report entirely in English about conditions in Honduras to "help" with their asylum claim).

105. *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (applying the *Mathews* factors to an exclusion hearing).

106. *See* VERA STUDY 2017, *supra* note 1, at 5–6 (highlighting that a system appointing counsel to noncitizens facing removal would significantly increase successful outcomes and tax revenue for governments); NERA STUDY 2014, *supra* note 17, at 35 (concluding that a system appointing counsel to noncitizens facing removal would ultimately pay for itself); *see also infra* Part III.A (examining the role of economics in judicial efficacy of removal proceedings).

removal proceedings. If the government interest is in favor of appointed counsel, this means that all three *Mathews* factors weigh in favor of this outcome. Thus, this factor is crucial to overcome the presumption against appointed counsel. In analyzing the government interest, this Part considers economics and judicial efficiency, just outcomes, and international reputation.

A. Economics and Judicial Efficiency

A recent Senate Committee hearing highlighted a Government Accountability Office report, which cited both increasing legal complexity and the number of continuances granted as major factors contributing to the problematic backlog in the nation's immigration courts.[107] The report cited a twenty-three percent increase in continuances issued from 2006 to 2015, and a fifty-four percent increase in immigration judge related continuances issued during this same time period.[108] Additionally, the number of total case completions has declined even though the number of immigration judges has increased by seventeen percent.[109] Immigration judges feel pressure to grant individuals not represented by counsel at least one continuance and often more, especially if the individual is a minor, does not speak English, or generally does not understand the nature of the proceedings.[110] Appointed counsel would likely decrease the overall number of continuances granted—there

107. *U.S. Immigration Court System Before the Subcomm. on Border and Immigration of the S. Comm. on the Judiciary*, 115th Cong. (2018) (testimony of Andrew R. Arthur, Resident Fellow, Law and Policy, Center for Immigration Studies). *See generally* Andrew R. Arthur, *U.S. Senate Committee on the Judiciary, Subcommittee on Border and Immigration Strengthening and Reforming America's Immigration Court System*, CENTER FOR IMMIGRATION STUDIES (Apr. 18, 2018, 2:30 PM), https://cis.org/Testimony/Strengthening-and-Reforming-Americas-Immigration-Court-System [hereinafter *CIS Report 2018*].

108. *See CIS Report 2018*, *supra* note 107 (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 22 (June 2017)) ("Department of Homeland Security [ ] attorneys and others complained that the 'frequent use of continuances [by Immigration Judges] resulted in delays and increased case lengths that contributed to the backlog.'").

109. *Id.*

110. *See id.* ("If an alien is unrepresented, the court will generally grant at least one continuance to find counsel. If the court subsequently goes ahead thereafter, notwithstanding the request of the alien for an additional continuance to find counsel, the case will likely be remanded, and the immigration judge runs the risk of being accused of denying due process. Similarly, an immigration judge who refuses to grant multiple continuances to an alien to file an application for relief, or to submit evidence in a case, may be accused by a reviewing court of violating due process.").

would be no need to grant them to give time to find representation, and counsel could assist with complex legal questions that might otherwise result in continuances for an individual proceeding pro se.

A system of appointed counsel would increase successful outcomes in removal proceedings, and this could increase tax revenue for governments. A study by the Vera Institute of Justice analyzed a pilot program in New York City that provided legal counsel to all noncitizens facing removal in one of the city's immigration courts.[111] Unrepresented individuals previously had successful outcomes in deportation proceedings only four percent of the time; however, this statistic jumped to forty-eight percent once the city started providing representation to every individual.[112] The study also analyzed the potential economic impact of this increase and estimated that if all undocumented immigrants had successful outcomes in immigration court, this could contribute 200 million dollars annually in New York state and local taxes.[113] While appointed representation does not guarantee successful outcomes in every case, the study's findings suggest that such a system could substantially increase tax revenue for states choosing to adopt this procedural safeguard.

A system of appointed counsel would also significantly decrease costs associated with detention. While difficult to estimate the precise costs, a study by the National Economics Research Associates (NERA) Economic Consulting Group estimated that a system of appointed counsel for noncitizens facing removal would ultimately pay for itself.[114] This is primarily because detention is extremely costly to the government, and noncitizens with representation would be less likely to be detained for significant periods of time.[115] Well-counseled clients would be more likely to accept removal without unnecessary delays; counsel could also better identify options for relief for their clients and either secure a dismissal of the proceeding or a release from detention pending the outcome of the case.[116] Other examples of savings for the government that are associated with decreased detention

111. VERA STUDY 2017, *supra* note 1.

112. *Id.* at 24–26.

113. *Id.* at 55.

114. *See* NERA STUDY 2014, *supra* note 17; *see also* Kirk Semple, *Public Defender System for Immigrants Facing Deportation Would Pay for Itself, Study Says*, N.Y. TIMES (May 29, 2014), https://www.nytimes.com/2014/05/30/nyregion/study-favors-free-counsel-to-navigate-deportation.html (citing the NERA Study 2014 estimate that a system for providing legal counsel for every poor immigrant facing deportation would cost about 208 million dollars per year and save the government 204–208 million dollars per year, thus theoretically paying for itself).

115. NERA STUDY 2014, *supra* note 17, at 6.

116. *Id.* at 5–6.

include the individuals' ability to work, pay taxes, and care for dependents who might otherwise have to rely on government-funded programs and services to survive.[117]

The efficiency argument is not without critics or potential pitfalls. First, it may not always be the case that representation streamlines proceedings; in some cases, attorneys may prolong the proceedings by filing more motions and appeals.[118] Second, a focus on efficiency can undermine more idealistic arguments focused on the added value that lawyers bring to adversarial proceedings.[119] Regardless, the potential to streamline inefficient proceedings while benefitting economically merits additional research and consideration.

B. Just Outcomes

Should judges have the role of both counsel and decisionmaker? Immigration judges are expected to "fully develop the record," especially in cases in which the noncitizen facing removal is unrepresented.[120] *C.J.L.G. v. Sessions*,[121] a recent decision from the Ninth Circuit, upheld the longstanding precedent that minors facing removal do not have a categorical right to appointed counsel.[122] The court admitted that an application for asylum is a complex legal proceeding but found the lack of representation acceptable because an immigration judge takes on the duty to "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts."[123] The court held that the immigration judge's inquiry in *C.J.L.G.* was adequate and there was therefore no need for appointed counsel.[124]

Now more than ever, immigration courts and policies are in the public spotlight.[125] Some judges have expressed concern with the state of immigration

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117. *Id.*

118. *See* Ingrid v. Eagley, Gideon*'s Migration*, 122 YALE L.J. 2282, 2310 (2013) (comparing efficiency-based arguments for appointed counsel in immigration courts to those in criminal settings that highlight the efficiency of plea-bargains).

119. *See id.* (noting the "profound difference that good lawyering can make" as evidenced by the landmark *Gideon* decision).

120. *See* Jacinto v. INS, 208 F.3d 725, 733 (9th Cir. 2000).

121. 880 F.3d 1122 (9th Cir. 2018).

122. *Id.* at 1136.

123. *Id.* at 1138 (citing Agyeman v. INS, 296 F.3d 871, 877 (9th Cir. 2002)) ("Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.").

124. *Id.*

125. *See* Markon, *supra* note 5 (reporting about an IJ who claimed that "I've taught

law proceedings. One news story reported that Judge Robert Katzmann of the Second Circuit—which was getting about 2,000 immigration appeals per year—noted that without effective counsel in immigration court, appellate court judges "weren't getting a legal record they could rule on."[126]

In *Aguilera-Enriquez v. INS*,[127] the Sixth Circuit considered appointment of counsel for indigent noncitizens facing deportation and held that due process does not require this safeguard.[128] District Judge DeMascio wrote a scathing dissent addressing the particular harm associated with deportation, especially for legal permanent residents:

> When the government, with plenary power to exclude, agrees to allow an alien lawful residence, it is unconscionable for the government to unilaterally terminate that agreement without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which may follow an In re Gault [sic] finding of delinquency. A resident alien's right to due process should not be tempered by a classification of the deportation proceeding as "civil," "criminal," or "administrative." No matter the classification, deportation is punishment, pure and simple.[129]

Judge DeMascio concluded that because deportation parallels the punishment of a crime, only a per se rule providing for appointment of counsel would ensure due process of law.[130] In considering such "lasting punishment," it is hard to understand how courts can continue to characterize these proceedings as purely civil and disregard the significance of the individual liberty interest at stake and the severe consequences of deportation.

C. International Reputation

The United States faces international pressure to uphold adequate standards of due process in its immigration courts. By ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the United States agreed to "eliminate racial discrimination in all its forms."[131] The United Nations Human Rights Committee (HRC) has noticed

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immigration law literally to three-year-olds and four-year-olds . . . It takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done").

126. Dara Lind, *A New York Courtroom Gave Every Detained Immigrant a Lawyer. The Results Were Staggering*, VOX (Nov. 9, 2017, 9:10 AM), https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer.

127. 516 F.2d 565 (6th Cir. 1975).

128. *Id.* at 569.

129. *Id.* at 572 (DeMascio, J., dissenting).

130. *Id.* at 573 (DeMascio, J., dissenting).

131. CERD REPORT, *supra* note 99, at 8.

and chastised the United States' failure to provide counsel in immigration proceedings for indigent individuals and the disparate impact this has on individuals of different races.[132] The HRC recommended multiple reforms, including reducing mandatory detention as well as providing legal representation in immigration and other civil contexts .[133] These recommendations are not limited solely to the practices of the United States; the HRC has expressed the same concern "on numerous occasions over states' failure to provide counsel in various types of civil and immigration cases."[134] Some countries in Europe, however, do provide financial support for appointed counsel to noncitizens facing removal; the United Kingdom provides counsel free of charge, and Sweden provides legal assistance to minors and other migrants with special needs.[135]

The United States should follow these examples and expand procedural protections where liberty interests or basic human needs are at stake by prioritizing the establishment of a right to legal counsel for noncitizens facing removal. This would be a step in the right direction toward honoring its obligation under the CERD and protecting its international reputation—at least, in this particular context.[136]

CONCLUSION

Appointing counsel to noncitizens facing removal proceedings would promote judicial efficiency, integrity, and the United States' international reputation. Accordingly, such a system could ultimately serve the government's interest. The United States should explore this possibility by researching the costs and savings a system of appointed counsel would incur. The Center for Immigration Studies report[137] sheds light on important factors behind the backlogged immigration system and points to areas in which efficiencies might be realized; the Vera[138] and NERA[139] studies provide useful frameworks for how this research might look and how the system may be implemented.

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132. *Id.*

133. *Id.*

134. *See id.* (citing multiple U.N. Human Rights Committee reports that recommend additional legal assistance to asylum seekers in Sweden, the Czech Republic, and Switzerland).

135. THE LAW LIBRARY OF CONGRESS, RIGHT TO COUNSEL FOR DETAINED MIGRANTS IN SELECTED JURISDICTIONS 7–9 (2017), https://www.loc.gov/law/help/right-to-counsel/right-to-counsel-detained-migrants.pdf.

136. *See* CERD REPORT, *supra* note 99, at 23 ("The federal government should prioritize establishing a right to legal counsel for immigrants in civil immigration proceedings and indigent litigants in other federal civil cases where liberty interests or basic human needs are at stake.").

137. *CIS Report 2018*, *supra* note 107; *see supra* Part III.A for further discussion.

138. VERA STUDY 2017, *supra* note 1, at 13–6; *see supra* Part III.A for further discussion.

139. NERA STUDY 2014, *supra* note 17; *see supra* Part III.A for further discussion.

Since the INA's explicit prohibition against appointing counsel at the expense of the government limits the circuit courts' exploration of what due process entails,[140] the Department of Justice (DOJ) should take the lead in implementing additional procedural protections in its immigration courts. The DOJ should investigate whether a system of appointed counsel in the immigration context would actually incur a net "expense to the Government," and therefore whether it could be implemented without conflicting with the statutory language of the INA. If such a system would actually be more economically efficient and, as the NERA study suggests, pay for itself,[141] there would seemingly be no conflict with the statute. Accordingly, the DOJ could issue guidance to clarify that appointed counsel does not incur an extra expense to the government and work toward implementing a comprehensive system of appointed counsel for all indigent noncitizens facing removal in U.S. immigration courts. Absent a legislative amendment to the INA, the DOJ is the only agency that could implement this change. An official shift in its interpretation of whether appointing counsel would be at "no expense to the Government" would be afforded *Chevron* deference in the courts so long as it is reasonable.[142] Shifting interpretations are permissible and even encouraged by *Chevron*—the agency should "consider varying interpretations and the wisdom of its policy on a continuing basis."[143] Thus, if supported by the research, the DOJ could make a reasonable and informed shift in its interpretation of the INA and implement a system of appointed counsel at no *net* expense to the government.

"The history of American freedom is, in no small measure, the history of procedure."[144] Procedural safeguards protect constitutional rights, and justice requires due process for noncitizens facing removal. As a nation of immigrants, the extension of procedural safeguards to noncitizens facing removal would preserve the integrity of our judicial system and our American ideals. Failing that, the government owes its citizens a careful examination of how it is using immigration court resources, and judicial efficiency demands a closer look at the hidden costs of not appointing counsel to noncitizens facing removal.

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140. 8 U.S.C § 1362 (2012) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.").

141. NERA STUDY 2014, *supra* note 17.

142. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (holding that agency interpretations of statutes should be upheld unless they are "arbitrary, capricious, or manifestly contrary to the statute").

143. *Id.* at 863–64.

144. Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).